IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE SOL LOUIE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

J. L. McCLEAR,
United States Attorney.

J. R. SMEAD,
Assistant U. S. Attorney.
Attorneys for Defendant in Error.
Boise, Idaho.

PRESS OF AL KENNARD, 319 N. EIGHTH, BOISE

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STATEMENT OF THE CASE

Defendant in error accepts the statement of the case of plaintiff in error, with the exception that it is claimed on the part of defendant in error that no cession of the lands of the Coeur d'Alene Indian Reservation has been made since 1899, and that the reservation is now and has, since the above date, remained the same as it was left at that time. It is claimed on the part of the defendant in error that by the treaty between the Coeur d'Alene Indians and the Government of the United States entered into in 1887, and ratified by Congress in 1891, the land comprising the Coeur

d'Alene Reservation was reserved as a home for the Indians then inhabiting it, and should forever remain Indian land and a reservation until changed by agreement with the Indians. The defendant in error also agrees with the statement on page 19 of the brief of plaintiff in error, to-wit: the only question which this Honorable Court is called upon to determine is, did the United States District Court for the District of Idaho, Northern Division, have jurisdiction of this case?

ARGUMENT AND AUTHORITIES

The indictment in this case is under the last part of Section 328 of the Federal Penal Code of 1910, as follows:

> "And all such Indians committing any of the above-named crimes, to-wit, (murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary and larceny), against the person or property of another Indian or other person within the boundaries of any State of the United States and within the limits of any Indian Reservation shall be subject to the same laws, tried in the same courts and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

It is conceded by plaintiff in error, page 18 of his brief, "That plaintiff in error and the deceased, Adeline Bohn Sol Louie, were, at the time of the commission of the alleged crime herein, Indians and members of the Coeur d'Alene tribe of Indians, and resided within the boundaries of what is known as the Coeur d'Alene Indian Reservation in Benewah County, State of Idaho."

In view of the above concession, the only thing to be decided is, did the patent in fee to Eugene Sol Louie result in

placing the land described in the patent to him outside the limits of the Coeur d'Alene Reservation, and did the patent in fee to him place him outside the jurisdiction of the Federal Court and within the jurisdiction of the State Court? In the treaty with the Indians made in 1887, and ratified by Congress in 1891, by which the northern part of the then reservation was open to settlement, 26 Stat. at Large, page 1028, Article 5 of said agreement, states as follows:

> "In consideration of the foregoing cession and agreements, it is agreed that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity; and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation."

There was another agreement or treaty with the Coeur d'Alene Indians in 1899 by which the townsite of Harrison, and a small body of land adjacent thereto, was disposed of and open to settlement, but this is on the east side of Coeur d'Alene lake and has no reference to the Coeur d'Alene Indian reservation as we know it now or as it was in 1906 at the time the Act of Congress was passed providing for the allotment of lands to Indians in severalty and after the allotments were made throwing the remainder open to settlement by white people. The treaty of 1899 regarding the Harrison tract was the last treaty made with the Coeur d'Alene Indians. The treaty of 1887, ratified in 1891, states that this was ever to remain Indian country and home for the Indians. The land in the reservation under that treaty

remains an Indian reservation, or Indian country, until such time as it is taken from the reservation or declared not to be a reservation by treaty. Such has never been done. The Act of Congress of 1906, 34 Stat. at Large, page 335, does attempt to do away with the reservation.

34 Stat. 335.

"That the Secretary of the Interior be, and he is hereby authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands in the Coeur d'Alene Indian Reservation, in the State of Idaho.

"That as soon as the lands embraced within the Coeur d'Alene Indian Reservation shall have been surveyed, the Secretary of the Interior shall cause allotments of the same to be made to all persons belonging to or having tribal relations on said Coeur d'Alene Indian Reservation, to each man, woman and child one hundred and sixty acres, and, upon the approval of such allotments by the Secretary of the Interior, he shall cause patents to issue therefor under the provisions of the general allotment law of the United States.

"That upon the completion of said allotments to said Indians the residue or surplus lands—that is, lands not allotted or reserved for Indian school, agency, or other purposes—of the said Coeur d'Alene Indian Reservation shall be classified under the direction of the Secretary of the Interior as agricultural lands, grazing lands, or timber lands, and shall be appraised under their appropriate classes by legal subdivisions, and, upon completion of the classification and appraisement, such surplus lands shall be opened to settlement and entry, under the provisions of the homestead laws, at not less than their appraised value, in addition to the fees and commissions now prescribed by law for the disposition of lands of the value of one dollar and twenty-five cents per acre, by proclamation of the President, which proclamation shall prescribe the manner in which these lands shall be settled upon, occupied, and entered by persons entitled to make entry thereon."

We believe it requires no authority to establish the point that a statute in violation of a treaty provision must fail of validity. The Act of Congress last quoted, and the general allotment act, known as the Dawes Act, together with a third Act of Congress empowering the Secretary of the Interior to shorten the trust period in the case of an allotment held by an Indian whom the Secretary may deem competent to manage his own affairs, are the only provisions of the law which militate against the provisions of the treaty in question. No other treaty with the Coeur d'Alenes touches upon this question, and, therefore, the treaty provision in question remains the solemn and binding agreement between the Coeur d'Alene tribe and the United States. This treaty has never been annulled, unless the Act last quoted, throwing a part of the reservation open for white entry, be deemed an annulment so far as that part of the reservation is concerned. That question does not arise here, since the land where the crime here involved was committed was a part of the land by the same Act, as well as by the treaty of 1887, specifically reserved for the Indians. Certainly the treaty provision, that the reservation should remain forever Indian land and be held as homes for the Indians, must control at least the lands particularly and specifically set apart as such homes. We may even further concede, for the sake of argument only, that the allotment in severalty to the individual members of the tribe of that part of the reservation reserved to the Indians, as distinguished from that part thrown open to white entry, was valid, on the theory that such allotting in severalty did not deprive the land of its character under the treaty as Indian land and Indian homes; but when it is attempted to be said that the general allot-

ment act, the special act opening a part of the reservation to whites, or the act generally empowering the Secretary to shorten the trust period of Indian allotments in general, are authority for the proposition that in this case the Secretary could issue a patent in fee to Eugene Sol Louie and thereby free this land of all restrictions, and enable him to pass a title to a white man, such a statement is merely to say, that these Acts of Congress have practically annulled the provisions of the treaty. We submit that no such thing has been done by Congress. Mere general legislation cannot be held to have such an effect.

Treaties with Indian tribes have always and uniformly been held to be obligations of the most solemn and sacred character, binding upon the United States in every particular. The status of an Indian tribe is, and always has been, entirely different from the status of an Individual Indian. The individual Indian is a ward of the United States, and the usual rights and duties attaching to that relation have always been observed. But an Indian tribe has always been recognized as having the right to treat with the United States. Both the Executive and the Congress have always recognized this right, and, in fact, it has never been questioned. The sacred character of the obligation of such a treaty has never been doubted, but, on the contrary, that character has been at all times more emphatically attributed to Indian treaties than to treaties with any other peoples or Governments. This is naturally so, because of the disparity existing between the parties.

We submit that, conceding the validity of white settlements on part of this reservation, and the validity of the allotments in severalty of the Indian lands, neither of which

questions are necessarily involved here, the obligations of the treaty of 1887 are such that the land reserved to the Indians must remain so reserved, and must retain its character as Indian land exclusively, until such time as that provision is changed by another treaty between the parties.

As appears from the above, the allotments of the Coeur d'Alene Reservation were made under the general allotment law of the United States as found in 24 Stat. at Large, 388, and known as the Dawes Act, and in Section 5 thereof we find as follows:

> "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

and thus it is shown that this case is similar to the case of the State vs. Columbia George, 65, Pac. 605, in that lands allotted under the general allotment law would be held in trust for a period of twenty-five years. In any view of the case, the Secretary could not divest the land of its Indian character, nor empower an individual Indian to do so.

The Coeur d'Alene Indian Reservation being by treaty of 1887, ratified in 1891, reserved as Indian land and homes for the Indians forever, unless by consent of the Indians it may be sold or used for some other purpose, and no treaty

having been made, and the land of the Indians being allotted under the allotment law of the United States, the land whereon Adeline Bohn Sol Louie was killed, namely, the allotment of her husband, and under Section 336, 35 Statute at Large 1152, "the crime is deemed to have been committed at the place where the injury is inflicted" is still, and was, on May 4, 1919, the time of the commission of the crime, the Coeur d'Alene Indian Reservation, and the District Court of the United States for the District of Idaho had jurisdiction of the offense.

United States v. Celestine, 215 U. S. 278, (54 L. Ed. 195.)

Donnelly vs. United States, 228 U. S. 242, (57 L. Ed. 820).

Ex parte Van Moore, 221 Fed. 954.

United States v. Fred Nice, 241 U. S. 591, (60 L. Ed. 1192).

United States v. Sandoval, 231 U. S. 26, (58 L. Ed. 107).

Johnson v. Geralds, 234 U. S. 420, (58 L. Ed. 1383).

In the Celestine case, we find the following language:

"Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of a reservation; at any rate, it cannot be said to be clear that Congress intended, by the mere grant of citizenship, to renounce entirely its jurisdiction over the individual members of this dependent race. There is not in this case in terms a subjection of the in-

dividual Indian to the laws, both civil and criminal, of the State; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States."

Plaintiff in Error cites in his brief the case of in re Heff, 196 U. S. 592, 49 L. Ed. 848, but this case is overruled in the case of United States v. Fred Nice, herein cited.

The Coeur d'Alene Reservation was recognized by Congress as late as 1916 in the Act found in Vol. 39 Stat. at L., page 435.

In the Celestine case the party murdered and the one committing the offense were both Indians having patented land. In that respect it is a little different from the case at bar, as the defendant in this case had a patent to his land but his wife was a ward of the Government, having an allotment which had never been patented, and the question arises in this case, as in so many cases on the different Indian reservations, or among the different tribes of Indians, as to the jurisdiction of the State court or of the Federal court. Especially is this so where an Indian may have an allotment next to a white man who has received a patent or in a case where an Indian may have received a patent and a crime may be committed on lands that have been patented. It seems that from a long line of decisions of the Supreme Court of the United States, part of which have been herein cited, that the policy of the Government is to hold or maintain the control of Indians until such time as Congress by definite act has clearly removed the Indians from the Government's control. There are a number of other considerations in this case that are brought up by the evidence of the Superintendent of the Coeur d'Alene Indian Reservation

and Doctor Hill, the physician in charge, some of which are as follows: The land comprising townsites and 18,000 acres of land unsold on the Coeur d'Alene Indian Reservation when sold and paid for is to be distributed among all of the Indians of the reservation, or the Coeur d'Alene tribe, and the defendant in this case, by the testimony of the Superintendent, receives his pro rata share of the proceeds of the above lands. Congress has appropriated each year for the care and control of the Indians certain amounts to pay for the services of a physician, a blacksmith, carpenter, and others, to look after the welfare of the Indians, and the physician employed looks after all of the Indians irrespective of whether they are allottees or have received a patent, and we respectfully submit that the defendant in this case, although he had received a patent in fee for his land, was yet a ward of the Government, committing the crime within the limits of the Coeur d'Alene Indian Reservation within the State of Idaho, and the United States District Court of the District of Idaho had jurisdiction of the offense.

Respectfully submitted,

J. L. McCLEAR,

J. R. SMEAD,
Assistant U. S. Atty.
Boise, Idaho.